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No. 88-173

In the Supreme Court of the United States

OCTOBER TERM, 1988

LOIS LINQUIST, ETC., PETITIONER

v.

OTIS R. BOWEN, SECRETARY, HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner, who prevailed against the Secretary of Health and Human Services and the Railroad Retirement Board in a class action, seeks an award of attorney's fees. She argues first that the suit created a "common benefit," so that an award of attorney's fees is proper under 28 U.S.C. 2412(b) on a common law theory. Alternatively, she seeks fees under 28 U.S.C. 2412(d), under which she must establish that the government's position is not "substantially justified," and asks this Court to vacate and remand to the court of appeals for reconsideration in light of this Court's decision in *Pierce* v. *Underwood,* No. 86-1512 (June 27, 1988).

1. a. The underlying case for which petitioner seeks attorney's fees was a nationwide class action brought on be-

half of persons who receive both social security benefits and railroad retirement benefits and in addition earn income from outside sources. Separate provisions of the Social Security Act (42 U.S.C. 403(b) and (f)) and the Railroad Retirement Act (45 U.S.C. 231(g)(2)) require an offset against an individual's benefits of 50 cents for each dollar of earned income in excess of an exempt amount. Petitioner contended that persons who receive both social security retirement benefits and railroad retirement survivors' benefits may have their benefits reduced by only one 50% offset, rather than two. The district court agreed with petitioner and enjoined the use of a double offset (Pet. App. 17a-57a).

The court of appeals stayed this order pending appeal, over petitioner's vigorous opposition (see Pet. App. 58a). It then affirmed the district court (813 F.2d 884; Pet. App. 59a-71a). The court acknowledged that Congress did not consider the specific question at issue (*id.* at 69a). It nevertheless concluded that the 1972 amendments to the Social Security Act demonstrated an "overriding congressional intent" not to discourage retirees from continuing to work, and that this purpose would be frustrated by applying two offsets (*id.* at 71a).

b. Petitioner then filed an application in the court of appeals for an award of attorney's fees for the appeal.[1] She presented two alternate theories to justify such an award: first, that by prevailing in a class action she had created a "common benefit" and thus was entitled to an award of fees under 28 U.S.C. 2412(b), which waives the government's sovereign immunity to allow an award of attorney's fees "to the same extent that any other party would be liable under the common law * * *." Alterna-

[1] Petitioner's parallel application in the district court for attorney's fees for work in that court remains pending.

tively, she sought fees under 28 U.S.C. 2412(d), under which the United States is liable for attorney's fees to a prevailing party in a civil action in which its position was not "substantially justified" (28 U.S.C. 2412(d)(1)(A)).[2] In its initial order (Pet. App. 72a-73a), the court of appeals accepted petitioner's common benefit theory and thus did not reach her subsection (d) claim. It awarded $22,362.50 in attorney's fees for the appeal, most of it at a rate of $125 an hour (Pet. App. 73a).

On rehearing, the court of appeals vacated its earlier fee award and denied the application for fees (Pet. App. 1a-16a). The court first rejected the claim under Section 2412(d), because the government was substantially justified; it "found the issue on the merits to be a close one" (Pet. App. 3a-4a). The court then rejected petitioner's "common benefit" theory, explaining that "the common law basis of the common benefit theory envisioned a fee-shifting to the unnamed beneficiaries of the litigation" (*id.* at 8a). Accordingly, the court explained, this theory does not apply when, as here, the government (and thus the taxpayers) would bear the cost, rather than just the benefitted class (*id.* at 9a-10a).

2. The court of appeals' rejection of petitioner's "common benefit" theory was correct and does not conflict with any decision of this Court or of any court of appeals. Further review of the question by this Court is therefore unwarranted. Nor is the decision of the court of appeals on the alternative theory under Section 2412(d) contrary to this Court's subsequent decision in *Underwood*. A remand

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[2] Unlike fee awards under subsection (b), fee awards under this subsection are subject to a cap of $75 an hour, adjustable for "an increase in the cost of living or a special factor" (28 U.S.C. 2412(d)(2)(A)). See *Underwood*, slip op. 17-20.

of the case in light of *Underwood* is therefore also unwarranted.

The underlying theory behind common benefit fee awards, as well as common fund awards (from which the common benefit theory is derived) is that such awards are proper only when "there [is] reason for confidence that the costs could indeed be shifted with some exactitude to those benefitting" from the litigation. *Alyeska Pipeline Co.* v. *Wilderness Society,* 421 U.S. 240, 265 n.39 (1975). This objective is met directly when the award is under a common fund theory, where an attorney's fee may be deducted from the monetary recovery that will be paid by the defendant to the members of the victorious class.[3] The common benefit theory is available where, although there is no specific fund that has been awarded to the plaintiffs, having the defendant pay the fee award will still result in shifting the cost of the fee to the benefitted parties, because all of the owners or members or beneficiaries of the defendant will equally benefit from the outcome of the case. For example, in a shareholders' suit, where the expenses of plaintiff's lawsuit have been incurred for the benefit of the corporation and the other shareholders, a fee award is proper because "[t]o allow the [other shareholders] to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375, 392 (1970). Similarly, litigation brought by a member of a union against the union itself "necessarily render[s] a substantial service to his union as an institution and to all of its mem-

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[3] The back benefits awarded to class members in this case created a fund out of which a common fund award might possibly have been paid, but petitioner waived any recovery of fees out of that fund (Pet. App. 7a n.5).

bers" by "dispel[ling] the 'chill' cast upon the rights of others." *Hall* v. *Cole,* 412 U.S. 1, 7, 8 (1973). As in the case of the shareholder suit, such an award merely shifts the costs of the litigation to those who benefit from it (*id.* at 9).

The courts of appeals have uniformly rejected fee requests based on the common benefit theory where it cannot be said that the people who benefit from the litigation are ultimately paying the fee. For example, in *Grace* v. *Burger,* 763 F.2d 457 (D.C. Cir. 1985), plaintiff had successfully challenged a statute restricting the right to demonstrate on the grounds of the Supreme Court. The D.C. Circuit denied fees on a common benefit theory, reasoning that "[a]n award of fees here would not compel the beneficiaries to compensate the winning litigant who acted as their representative, but would assess costs against the unrelated losing party" (*id.* at 460). See also *Murphy* v. *International Union of Operating Engineers,* 774 F.2d 114, 127 (6th Cir. 1985); *Holbrook* v. *Pitt,* 748 F.2d 1168, 1174-1175 (7th Cir. 1984); *Shimman* v. *International Union of Operating Engineers,* 744 F.2d 1226, 1234-1236 (6th Cir. 1984) (en banc); *Wilderness Society* v. *Morton,* 495 F.2d 1026, 1029 (D.C. Cir. 1974) (en banc), aff'd *sub nom. Alyeska Pipeline Co.* v. Wilderness Society, 421 U.S. at 245 & n.14, 259-260. Most directly on point is *Jordan* v. *Heckler,* 744 F.2d 1397, 1400-1401 (10th Cir. 1984), which, like the present case, involved a claim for attorney fees for the successful litigation of a class action challenging the agency's interpretation of a provision of the Social Security Act. The court noted that a common benefit award was not proper because it would not spread the cost proportionately among the beneficiaries of the litigation, but rather was "simply an award against the Government or all persons who pay Social Security taxes" (744 F.2d at 1400). Similarly here, the persons who

benefitted from this litigation were those from whom the government had collected two offsets. A fee award against the agencies, however, would be paid, not just by those benefitted, but by all taxpayers. A fee award here would thus greatly expand the common law theory of common benefit.

Petitioner appears to acknowledge that the common law concept of common benefit fee awards does not apply to this case.[4] Instead, she candidly calls on this Court to expand the common benefit theory to cover this case (Pet. 10). She suggests that when Congress adopted Section 2412(b), "in effect, it amended the common benefit theory in this context" to allow such a new theory (Pet. 10). This argument is untenable. Section 2412(b) does not expressly refer to the common benefit theory; it simply states that "[t]he United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law * * *." Accordingly, the statute cannot be read as mandating the application of the common benefit theory against the United States, thereby expanding the scope of liability under that theory beyond the circumstances recognized under common law. It simply applies existing theories "to the same extent that" they apply to private parties. The legislative history confirms that the purpose of this section was that "the United States should be held to the same standards in litigating as private parties" and that "the Federal government and civil litigants [should be placed] on a completely equal footing." H.R. Rep. 96-1418, 96th Cong., 2d Sess. 9 (1980). While it may be true that it will normally be quite

[4] Petitioner objects to the court of appeals' conclusion "that the common benefit theory [must] be applied exactly as it had been developed in the common law" (Pet. 7), and concedes that while the common law theory requires that the defendant pay the fee only if it is "a proxy for * * * a benefitted class of recipients," the United States "will never be" such a proxy (Pet. 9).

difficult to use a common benefit theory against the United States, that result follows only because of the nature of litigation against the United States. If and when a case arises that does fit within the common benefit theory as it applies to private parties, the United States will be liable for fees.[5]

Indeed, under petitioner's interpretation of the statute, Section 2412(d) would lose much of its purpose, allowing litigants to use the "common benefit" analysis to evade the requirement that a fee award be made only when the government's position is not substantially justified, whenever the litigation can be said to have resulted in some public benefit. Thus, if petitioner is to obtain attorney's fees here, she must meet the standards of Section 2412(d).

3. Petitioner alternatively asks this Court to vacate the court of appeals' refusal to make a fee award under Section 2412(d) and to remand for reconsideration in light of *Underwood*. Petitioner contends that the court of appeals determined that the government's position was substantially justified on the basis of two objective factors that this Court rejected in *Underwood* (Pet. 13-14). But petitioner misreads *Underwood*. In that case, the Court simply found that the objective factors, while relevant, were not conclusive, and were an insufficient basis on which to

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[5] Petitioner also argues that her position is supported by 28 U.S.C. 2412(c)(2). But that section, like Section 2412(b), makes no mention of the common benefit theory. Section 2412(c)(2) merely allocates the responsibility to pay a fee award between the Treasury and the individual agencies, if and when an award is properly assessed under other sections of the statute. (For example, it requires the agency to pay rather than the Treasury if the basis of the award is bad faith.) In any event, Congress was careful to provide in Section 2412(b) that a fee award can be made only if a private party would have been liable. Congress would scarcely have made a significant substantive addition to the explicit coverage of Section 2412(b) in a statutory provision dealing with allocations.

overturn the determination of the court entrusted with the responsibility for making the fee decision that the government's position was not substantially justified (slip op. 14-16). The court of appeals here relied on factors similar to those in *Underwood*—the grant of a stay and the fact that the decision on the merits was in conflict with a decision of the D.C. Circuit in an earlier case. But *Underwood* recognized that those factors are relevant, though not conclusive, and the court of appeals here cited them simply as support for the ultimate conclusion that "we found the issue on the merits to be a close one" (Pet. App. 4a). It is also significant that in this case the court of appeals was itself the court entrusted with the responsibility for determining, in the first instance, whether a fee award was appropriate for representation in that court, and thus it was not reviewing a lower court decision regarding substantial justification. In that context, it was entirely proper for it to consider factors the Court in *Underwood* recognized as relevant, and to give them such weight as the court considered appropriate in the circumstances.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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